



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OFFICE OF
REGIONAL COUNSEL

MAR 19 2019

VIA U.S. MAIL & EMAIL TO: CARRIE@GRMLAWGROUP.COM

Carrie Menikoff
GRM Law Group
5285 Meadows Road, Ste. 330
Lake Oswego, OR 97035

RE: Subpoena Duces Tecum
Bullseye Glass Co. v. Governor Kate Brown, et al.
United States District Court for the District of Oregon; Civ. Action No. 3:17-cv-1970-JR
FOIA EPA-R10-2019-004043

Dear Ms. Menikoff,

I am writing to address the subpoena that you sent to us via First Class Mail on February 19, 2019, related to the above-referenced lawsuit. The subpoena seeks the production of certain EPA documents related to Bullseye Glass Co., EPA communications with the Oregon Department of Environmental Quality regarding Bullseye Glass Co. and 6S, communications to and from specific employees, and documents and communications regarding 6S and other companies throughout the country.

EPA's *Touhy* Regulations

As Kris Leefer of my office mentioned to you during a telephone call in February 2019, by statute, federal agencies are vested with the authority to prescribe the manner in which their employees respond to requests for information from outside sources. Specifically, 5 U.S.C. § 301 provides (in pertinent part) that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, and the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of records, papers and property." Under this authority, government agencies issue regulations governing the manner in which the agency may respond to demands for testimony and the production of documents. Such regulations are commonly called "Touhy" regulations, in reference to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Supreme Court upheld the authority of the Attorney General to centralize determinations concerning subpoena requests and forbid any unauthorized response. *Id.* If the decision-maker refuses to permit production, a federal employee cannot be compelled to provide the information, even if requested to do so by subpoena. See *Id.*

EPA is not a party to the above-referenced lawsuit. EPA's *Touhy* regulations at 40 C.F.R. Part 2, Subpart C, contain restrictions on EPA employees testifying or producing documents regarding official matters in any proceeding where the United States Government is not a party. See 40 C.F.R. §§ 2.401 *et al.* The purpose of the regulations is "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not

used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.” 40 C.F.R. § 2.401(c).

Conversion of Request for Documents to FOIA Request

Under 40 C.F.R. § 2.405, when a subpoena is “essentially a written request for documents, the requested documents will be provided or denied in accordance with subparts A and B of this part where approval to respond to the subpoena has not been granted.” Because your subpoena only requests documents, your subpoena will be treated in accordance with the FOIA and EPA’s applicable regulations.

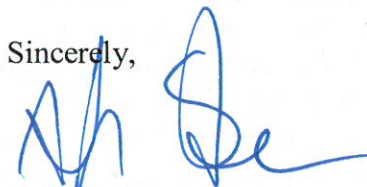
EPA will process your request for documents under its regulations as a FOIA request, and any responsive documents or parts of documents may be subject to withholding under the FOIA’s applicable exemptions. EPA will inform you of the costs, if any, of processing the FOIA request in accordance with the EPA’s regulations at 40 C.F.R. § 2.107. Please note also that EPA reserves the right to object to your requests for documents under the Federal Rules of Civil Procedure.

As you discussed with Ms. Leefers, a previous subpoena from you was converted into a FOIA request, FOIA identification number EPA-R10-2018-004591, pursuant to the process described herein in February 2018. We will continue to process records responsive to that request separately.

Your new FOIA request has been assigned FOIA identification number EPA-R10-2019-004043 and is also currently being processed by EPA. We will contact you regarding the cost of processing this new FOIA request in accordance with the FOIA and EPA’s applicable regulations.

For the reasons set forth above, I determine authorizing compliance with your subpoena to the Region 10 Administrator would not be “clearly in the interests of EPA.” We request that you withdraw the subpoena issued to Region 10’s FOIA Officer. If you are unwilling to do so, contact Ms. Leefers as soon as possible at 206-553-1532 or by email at leefers.kristin@epa.gov. Any questions regarding this response should also be directed to Ms. Leefers.

Sincerely,



Allyn L. Stern
Regional Counsel